



7533-01-P

NATIONAL TRANSPORTATION SAFETY BOARD

49 CFR Parts 821 and 826

[Docket No. NTSB-GC-2011-0001]

Rules of Practice in Air Safety Proceedings;

Rules Implementing the Equal Access to Justice Act of 1980

AGENCY: National Transportation Safety Board (NTSB or Board).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The NTSB proposes various amendments to our regulations, which sets forth rules of procedure for the NTSB's review of certificate actions taken by the Federal Aviation Administration (FAA); and rules of procedure concerning applications for fees and expenses under the Equal Access to Justice Act of 1980 (EAJA). The NTSB previously issued an advance notice of proposed rulemaking (ANPRM) and has carefully considered comments submitted in response to the ANPRM concerning these procedural rules. This document contains both a discussion of the comments and explanations for the changes proposed herein.

DATES: Send your comments on or before [INSERT DATE 60 days from date of publication].

ADDRESSES: You may send comments identified by Docket ID Number NTSB-GC-2011-0001 using any of the following methods:

Federal eRulemaking Portal: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

Mail: Send comments to NTSB Office of General Counsel, 490 L'Enfant Plaza East, SW, Washington, D.C. 20594-2003.

Facsimile: Fax comments to 202-314-6090.

Hand Delivery: Bring comments to 490 L'Enfant Plaza East, SW, 6th Floor, Washington, D.C., between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the SUPPLEMENTARY INFORMATION section of this document.

Privacy: We will post all comments we receive, without change, to <http://www.regulations.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: David Tochen, General Counsel, (202) 314-6080.

#### SUPPLEMENTARY INFORMATION:

##### I. Background - Advance Notice of Proposed Rulemaking

On December 22, 2010, the NTSB published an ANPRM inviting public comments concerning the NTSB procedural rules codified at 49 CFR parts 821 and 826. 75 FR 80452. The NTSB specifically sought comments concerning the standard of review for emergency determinations, discovery and exchanges of information between parties, and electronic filing of documents in air safety

enforcement cases before the Board. The NTSB also sought comments concerning outdated rules in 49 CFR part 826, governing claims brought under the EAJA.

The ANPRM included a discussion of the rationale for the Board's procedure for handling certain aspects of emergency cases. The FAA issues emergency orders when it determines the interests of aviation safety require that the order take effect immediately, and, in those cases, the certificate holder may not exercise certificate privileges during the pendency of an appeal with the NTSB. Section 716 of the Aviation Investment and Reform Act for the 21st Century<sup>1</sup> (hereinafter, "the Act") amended 49 U.S.C. 44709 by granting the NTSB authority to review such emergency determinations. The ANPRM sought comments concerning this review process. Specifically, the NTSB described the considerations, including Federal court rulings and comments received in response to the NTSB's Interim Rule (published on July 11, 2000 (64 FR 42637), initially implementing section 716 of the Act) resulting in the adoption, in the Final Rule (published on April 29, 2003 (68 FR 22623)), of the standard of review found in 49 CFR 821.54(e). Section 821.54(e) directs NTSB's law judges to dispose of petitions for review of the FAA's emergency determinations by "consider[ing] whether, based

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<sup>1</sup> Pub. L. No. 106-181, section 716 (2000) (codified at 49 U.S.C. 44709(e)(3)).

on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal." 75 FR at 80452-80453. The aspect of the standard relating to the law judges' assumption of the truth of the FAA's allegations of fact prompted much feedback from commenters.

The ANPRM also sought comments pertaining to other matters. With regard to discovery and the parties' exchanges of information, the ANPRM requested feedback as to whether law judges should routinely issue prehearing orders to govern discovery, and whether a standard sanction should apply if parties fail to comply with a prehearing order or discovery obligation. Id. at 80453. On the subject of the electronic filing of documents, the ANPRM sought comments as to how to fashion electronic filing rules that could apply to pro se litigants, who may not have computer or Internet access. Finally, with regard to procedural rules applicable to applications for attorney's fees and expenses under the EAJA, the ANPRM sought general comments concerning updates to outdated provisions in 49 CFR part 826. For example, the ANPRM cited 49

CFR 826.40, which provides incorrect contact information for the FAA office overseeing the payment of fee awards under the EAJA. Id. at 80453-80454. The language of the ANPRM indicated, however, that the Board welcomed all comments relating to the procedural rules found in 49 CFR parts 821 and 826.

## II. Comments Received

The NTSB received 20 relevant comments in response to the ANPRM, which are available at <http://www.regulations.gov> (Docket No. NTSB-GC-2011-0001). The Board has carefully reviewed and considered all comments it received, and greatly appreciates the time and thought the commenters devoted to providing detailed comments, as the comments proved helpful in analyzing the aspects of 49 CFR parts 821 and 826 identified in the ANPRM. Our responses to the comments we received are included in the section below entitled "Proposed Changes."

The comments received primarily focus on the first issue set forth above, concerning the NTSB's review of emergency determinations. Some comments asserted the FAA must utilize its authority to issue immediately effective orders taking action against a certificate, and that the NTSB's current rules for review of the FAA's choice of taking such immediately effective action are appropriate. Other comments, however, maintain the current standard for review of emergency determinations is fundamentally unfair because it requires the NTSB's law judges

to assume the truth of the factual allegations the FAA makes in its certificate orders.

A. Comments in Favor of Not Changing 49 CFR

821.54(e) (Standard for Disposition of Petitions for  
Review of Emergency Determinations of the Federal  
Aviation Administration)

The FAA Deputy Chief Counsel submitted comments urging the NTSB to refrain from changing the language of 49 CFR 821.54(e). The submission quotes the NTSB's 2003 adoption of the Final Rule for the provision, in which the NTSB stated as follows:

An emergency determination is not ... a finding or conclusion that easily lends itself to evidentiary proof. And the right to challenge an emergency determination before the Board should neither be seen as, nor be allowed to become, an opportunity to contest the factual predicate underlying the Administrator's judgment that considerations of aviation safety require an individual or an entity to be deprived of certificate privileges pending adjudication of the charges. The Board's rules provide a contemporaneous, expedited review process designed for that very purpose which must, by statute, be fully completed within 60 days. We are aware of no Congressional desire to supplant that process with the 5-day emergency determination review process under the Board's new rules.

68 FR 22623–22624. The FAA contends the statutory basis and overall Congressional mandate concerning the process for review of emergency determinations have not changed, and the NTSB should, therefore, not change 49 CFR 821.54(e). The FAA also quotes portions of the FAA statute wherein Congress authorized

it to take immediate action when the Administrator believes an emergency exists relating to aviation safety. 49 U.S.C. 46105(c). The submission further provides that, as a matter of policy, the FAA adheres to publicly available criteria for determining whether certain circumstances amount to an emergency, under FAA Order 2150.3B, Ch. 6, p. 6-8, ¶ d (available at: [http://www.faa.gov/regulations\\_policies/orders\\_notices/index.cfm/go/document.information/documentID/17213](http://www.faa.gov/regulations_policies/orders_notices/index.cfm/go/document.information/documentID/17213)). The FAA also emphasizes, given the challenging time constraints of emergency cases, the NTSB does not have the time to engage in preliminary fact-finding in order to determine whether the Administrator's use of authority to pursue an emergency action was appropriate, and cites the Board's 60-day time limit for disposing of emergency cases on the merits in further support of this consideration.

An FAA Aviation Safety Inspector (ASI) also submitted comments. The ASI's submission includes several policy reasons for the current emergency enforcement procedure, and states:

The determining factor is safety, if the operator continues to operate in violation there is a serious problem. The only way [to] prevent an accident and the safety of others on the ground is to prevent the operator from breaking rules. The emergency action is the last resort to stop an operator from continuing to break rules.

The ASI's comments also summarize the internal FAA procedure through which an FAA Flight Standards District Office (FSDO) proceeds in an emergency case, and highlights FAA inspectors perception they are subject to a heavy burden in providing ample evidence in emergency cases to draft an enforcement investigation report (EIR) and initiate an emergency enforcement action against a certificate. Overall, the commenter urges the Board to maintain the current rule governing reviews of FAA emergency determinations.

Another commenter, who identified himself as part of "DOT/FAA," submitted comments similar to the previously described comments. The DOT/FAA commenter asserts the FAA does not abuse its authority in taking emergency action against a certificate, and states emergency cases are "discussed at length at all levels of management" within the FAA. The commenter also maintains the FAA only chooses to take emergency action "when public safety is jeopardized" and when the evidence shows such jeopardy.

Another individual commenter also urges the NTSB to maintain the current standard of review for emergency determinations. His concise submission made several points, including: 1) the expedited process for reviewing emergency determinations ensures a certificate holder is not deprived of due process; 2) the certificate holder's continued ability to



exercise certificate privileges "must be considered in light of the public's far greater right to expect safety in air transportation;" 3) the NTSB has found the FAA's decision to take emergency action valid in the vast majority of cases; and 4) the NTSB's mission of advancing transportation safety would be "jeopardized if reckless airmen are permitted to exercise the privileges of their certificates without fear of a swift penalty."

The law firm of Carstens and Cahoon submitted comments stating Congress never intended the language of 49 U.S.C. 44709(e) to provide for a separate evidentiary hearing to determine whether the FAA's action in emergency cases is justified. The commenter states the NTSB should view dispositions of cases via summary judgment<sup>2</sup> as similar to emergency review determinations: "the facts pled by FAA should be assumed and only when the facts offered by the movant (respondent) are 'significantly probative' [sic], contrasted with the facts pled by the government, should the 'emergency' finding be disturbed. Otherwise, justice allows this determination to continue only for 60 days anyway, if the evidential [sic] trial finds it should be reversed." Overall, the commenter urges the NTSB to maintain the current standard of review found at 49 CFR 821.54(e).

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<sup>2</sup> See 49 CFR 821.17(d) and Federal Rule of Civil Procedure 56.

B. Comments in Favor of Changing the Standard Set Forth in  
49 CFR 821.54(e)

The NTSB received many comments advocating a change to the standard of review for FAA emergency determinations. The Transport Workers Union of America (TWU) posited that the current rules are "too deferential to the [FAA]," and compared reviews of emergency determinations to temporary restraining orders and preliminary injunctions. TWU's comment urges the NTSB to adopt rules similar to those proceedings with the standard of review being whether the FAA can show a likelihood of success on the merits of a case.

The NTSB also received comments from the Air Line Pilots Association, International (ALPA). ALPA's submission stated, "[n]early eight years of unsatisfactory experience under [49 CFR 821.54(e)] demonstrates that the procedure has failed to meet either the spirit or intent of the legislation" under which the NTSB promulgated section 821.54(e). ALPA's submission includes a policy discussion as to how an FAA emergency action against a pilot's airman certificate could cost the pilot his or her livelihood, as well as a number of recommendations:

We recommend that the Board substantively amend Rule 54(e) [49 CFR 821.54(e)] to delete the language requiring the Administrator's factual allegations to be assumed to be true. We also recommend that Rule 54(e) be substantively amended to reflect the statutory authority delegated the Board to make an independent determination of whether or not an

emergency exists. This may be accomplished by deleting the phrasing in current Rule 54(e) that refers to a review of "whether the Administrator's emergency determination was appropriate under the circumstances," and changing the language in Rule 54(e) to reflect the language of the statute, [49 U.S.C. 44709(e)(3)] ("[i]f the Board finds that an emergency does not exist ... the [Administrator's] order shall be stayed").

ALPA's submission further urges the NTSB to "require that upon receiving a petition for review challenging the emergency nature of an order under Rule 54(e) that the FAA should be required to *forthwith* provide a showing of the evidence underlying its emergency determination" (emphasis in original).

The NTSB Bar Association (NTSBBA) submitted comments providing arguments similar to those provided by ALPA, as described above. Initially, NTSBBA urges the NTSB to delete the "assumption of the truth" language of 49 CFR 821.54(e), so the subsection would read, "the [law judge] ... shall consider whether the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal." Also with regard to emergency cases, NTSBBA requests the NTSB to require the FAA to provide a copy of the EIR in tandem with its service of an emergency order. The NTSBBA asserts that immediate disclosure of the EIR would promote settlement discussions and result in fewer discovery

disputes. Finally, NTSBBA suggests that a certificate holder seeking review of an FAA emergency determination "be allowed to concurrently submit evidence, affidavits and/or declarations in response to the FAA's factual allegations, in order to enable the law judge to properly consider whether the Administrator's emergency determination was appropriate under the circumstances." Michael L. Dworkin and Associates submitted comments which contained the same language as the NTSBBA submission.

Similarly, the law offices of Hoff and Herran submitted comments asserting the FAA utilizes its authority to issue emergency orders too frequently and in an unfair manner. The commenter urges the NTSB to change the rules applicable to emergency cases, by requiring the FAA to provide a copy of the EIR with every emergency order; and to delete from section 821.54(e) the phrase in which the truth of the allegations set forth in emergency orders is assumed and, instead, require the FAA to prove "by clear and convincing evidence that aviation safety would be likely compromised by proceeding in the normal procedure with the due process safeguards left in play during the pendency of the respondent's appeal."

The National Business Aviation Association (NBAA) also submitted comments urging the NTSB to delete from section

821.54(e) the provision assuming the truth of the FAA's allegations. The submission states:

NBAA proposes that when reviewing the FAA's determination that an emergency exists, the NTSB ALJ's should not be required to assume that all the facts alleged in the FAA's complaint are true, and should be able to consider facts not alleged in the FAA's complaint that the certificate holder believes are important. One such fact in particular that the NTSB ALJ's should be able to consider, regardless of whether it is mentioned in the FAA's complaint, is the length of time the FAA was aware of the alleged facts on which it bases its determination before the FAA initiated emergency action.

NBAA included an appendix to its submission containing a summary of "legislative and regulatory history" concerning the standard of review for emergency determinations. The appendix cites many of the same sources the NTSB listed in the ANPRM on this topic. The appendix also asserts that the NTSB's promulgation of 49 CFR 821.54(e), particularly with regard to the "assumption of truth" standard, is both contrary to legislative intent and unnecessary.

The Aircraft Owners and Pilots Association (AOPA) submitted comments urging the NTSB to delete the standard in section 821.54(e) requiring the law judge to assume the truth of the allegations in the Administrator's order. In setting forth its rationale for this proposed deletion, AOPA asserts many of the same points articulated by the NBAA. AOPA's comments suggests the NTSB's rules provide its law judges with the discretion to

determine whether they should assume the truth of the factual allegations contained in the FAA's emergency orders; in this regard, the comment makes an analogy to Federal Rule of Civil Procedure 65, which relates to preliminary injunctions and temporary restraining orders. In addition, AOPA proposes the NTSB amend the rules to provide specific permission for the submission of evidentiary records, "such as affidavits or other records," in conjunction with petitions for review of FAA emergency determinations. As to the process for reviewing those determinations, AOPA urges the NTSB to adopt a rule providing for further Board review; in particular, AOPA appears to suggest the full Board should either comment on the law judge's determination in every case in which a party requests it do so, or the rule provide for "an accelerated appeal to the full Board" of the law judge's determination.

The National Air Transport Association (NATA) also submitted comments, which do not specifically ask the NTSB to delete the "assuming the truth" language from section 821.54(e), but, instead, suggest requiring law judges to consider all facts contained in "pleadings and evidence" presented by either party. NATA's submission also proposes adding a sentence to section 821.54(e), which would state the law judge should consider, but is not required to follow, the FAA's interpretation of the Federal Aviation Regulations. NATA's comments include many

policy arguments, similar to those articulated in other comments, as justification for the suggested changes. The language of NATA's justification suggests the practical effect of its proposed changes would be the same as deleting the "assuming the truth" phrase from section 821.54(e). NATA also believes law judges should consider the amount of time the FAA has taken to issue an emergency order in determining whether the FAA's decision to take emergency action was appropriate. With regard to the amount of information available to certificate holders in emergency cases, NATA encourages the NTSB to issue a rule requiring the FAA to disclose the releasable portions of the EIR when the FAA issues an emergency order.

MMO Legal Services, LLC, (MMO) submitted two separate sets of comments. In one, MMO proposes the NTSB's rules should require the FAA to "allege, under oath, that its investigations have revealed 'that there is a good faith belief that one or more conditions represent an imminent threat to the safety of innocent persons or property on the ground, or to pilots or passengers aboard aircraft.'" MMO opines that, after providing this sworn statement, "FAA should be entitled to a rebuttable presumption the facts it has asserted are true," in lieu of the requirement that NTSB law judges assume the allegations are true. MMO also suggests the NTSB's rules should provide an opportunity for the certificate holder to "cure the condition"

the FAA alleges gives rise to the emergency. This suggestion is based upon the policy concern that certificate holders may lose their business and livelihood upon the FAA's issuance of an emergency order.

The Helicopter Association International (HAI) also submitted comments urging the NTSB to delete the phrase involving the assumption of the truth of the FAA's allegations in section 821.54(e). HAI's submission states:

It is difficult to see how there can be any 'meaningful' review of an FAA emergency determination, if the certificate holder is unable to challenge the facts, or regulatory interpretations included in the FAA complaint or to present facts outside the FAA's complaint that the certificate holder believes are important and pertinent to the FAA revocation action.

The comment suggests allowing NTSB law judges to consider facts not alleged in the FAA's order when determining whether the FAA's decision to take immediate action was appropriate. In addition, HAI's submission maintains that law judges should consider the length of time it took for the FAA to issue an emergency order after learning of the violation(s) involved.

Air Trek, Inc., submitted a comment urging the NTSB to take action to prevent the FAA from issuing emergency orders. It cites a recent Board case involving the FAA's emergency revocation of its air carrier certificate. NTSB Order No. EA-5440 (2009) (available at [http://www.nts.gov/legal/o\\_n\\_o/docs/Aviation/5440.pdf](http://www.nts.gov/legal/o_n_o/docs/Aviation/5440.pdf)). There,



the Board determined the FAA's case was unsupported, and later awarded attorney's fees to Air Trek under the EAJA. NTSB Order No. EA-5510 (2010) (available at: [http://www.nts.gov/legal/o\\_n\\_o/docs/Aviation/5510.pdf](http://www.nts.gov/legal/o_n_o/docs/Aviation/5510.pdf)). Air Trek summarizes the facts of its case and argues the NTSB should revise part 821 "to allow input from the respondent," and require its law judges to rule in favor of respondents "if there is any doubt which way a judgment should be made."

Similarly, a former FAA ASI submitted comments arguing the NTSB is not an impartial arbiter of certificate cases. The former ASI urges the NTSB to implement a standard without the "assumption of truth" language; however, beyond this, he does not suggest any specific language or standard that should be used to evaluate the propriety of the FAA's emergency determinations.

Air Tahoma submitted comments containing various details regarding the FAA's emergency revocation of its air carrier certificate. Air Tahoma's submission contains attachments of sections entitled "FAA misconduct - corroborating facts," "revocation report analysis," "revocation analysis chart," and "recent FAA operator violations." Air Tahoma principally contends the FAA is unfair in taking action against some certificate holders, and chooses to utilize its authority to issue emergency orders in an inequitable manner.

### C. Electronic Filing of Documents

Several commenters also addressed electronic filing in their responses to the ANPRM. The text of the ANPRM stated the NTSB is committed to creating an electronic filing system for certificate enforcement cases. All commenters who addressed electronic filing agreed the ability to file documents electronically in air safety enforcement actions would be helpful. The FAA's comments suggested electronic filing would not be an additional burden on pro se respondents, as other agencies that utilize electronic filing systems have made the method of electronic filing optional, and all that is required of a party for filing documents in an electronic system is registering to use the system. The FAA referred to the Merit Systems Protection Board and Equal Employment Opportunity Commission as examples of agencies that have successfully implemented electronic filing procedures, and opined that the vast majority of respondents will be familiar enough with electronic systems to utilize an electronic filing system.<sup>3</sup> The comment praised the Board for considering a new electronic filing system, but stated that the FAA understands implementing

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<sup>3</sup> Specifically, the comment stated, "In this technology-based age, the Board should feel confident that a party's pro se status is not an automatic impediment to accessing the technology through which electronic filing would occur. Aviation is a technology driven endeavor. All certificate holders, regardless of their level of experience and technological sophistication, have access to a myriad of opportunities to conduct their FAA business electronically."

such a new system will likely be time-consuming; as a result, the FAA suggested allowing parties to submit documents via electronic mail in the interim.

HAI's comments proposed the NTSB implement an electronic filing and docketing system similar to the Federal courts' Public Access to Court Electronic Records (PACER) system. Other comments simply observed that electronic filing would be helpful, and suggested allowing parties the option of filing either electronically or in paper format for a certain period of time, such as 2 years, before requiring all parties to file documents electronically.

#### D. Availability of Evidence and Discovery

The FAA's comments also addressed pre-hearing orders by stating that the Board's rules sufficiently cover the parties' discovery obligations, and asserting that a specific requirement in the rules for each judge to issue a pre-hearing order is unnecessary. The FAA's submission further notes 49 CFR 821.19(d) already contains an adequate enforcement mechanism for failure to comply with discovery, as it provides noncompliance with a law judge's order compelling discovery may result in a negative inference, or other relief the law judge may deem appropriate. The FAA contends that no changes to the rules relating to discovery are necessary, but, if anything, the only change the FAA might support would be limited to an initial

exchange of information among the parties. The FAA's submission states, as an example, "in an emergency case, the rule might specify that no later than 5 days after the answer to the complaint is served, the Complainant would provide the Respondent with copies of all non-privileged documents relied on to support the factual allegations in the complaint," and the certificate holder would be required to provide it with all discoverable documents related to all affirmative defenses upon which the certificate holder expects to rely.

As has been noted above, many comments urge the NTSB to require the FAA to provide a copy of the EIR in tandem with the FAA's issuance of a certificate order, or soon thereafter. AOPA's comments advocate for a rule applicable to both emergency and non-emergency cases that would require the FAA to disclose the releasable portions of the EIR when the FAA issues a notice of proposed certificate action, which precedes the FAA's issuance of a certificate order. AOPA's submission includes its rationale for this suggestion: respondents who are not represented by experienced counsel may not know how to obtain a copy of the releasable portions of the FAA's EIR, and may attempt to obtain such information by filing a Freedom of Information Act request, which is unnecessarily burdensome to both parties.

TWU's comments indicate it favors a requirement that law judges issue prehearing orders, to provide sufficient clarity to parties concerning deadlines and discovery obligations. In discussing potential sanctions for failure to comply with a discovery requirement, TWU suggests the law judges should issue orders barring evidence or creating presumptions. Other commenters take the position that the current system of allowing law judges the discretion to issue prehearing orders should not change, as it accomplishes the necessary objectives.

E. Rules Concerning the EAJA (49 CFR part 826)

With respect to the EAJA, many commenters suggest the standard for receiving an award of attorney's fees is too difficult to fulfill. The current standard is based upon a collection of several NTSB and Federal court cases, all of which have consistently held that a certificate holder is eligible for fees under the EAJA if the certificate holder prevailed in the underlying certificate action and can show the FAA was not substantially justified in pursuing it. The comments specifically discussing the part 826 EAJA rules did not distinguish the cases that form the basis for this standard, but instead opined that obtaining fees under the EAJA is sufficient to discourage the Administrator from pursuing meritless certificate actions.

A number of commenters ask the NTSB to adopt a bright-line standard in part 826 that a law judge's dismissal of a certificate action after the FAA voluntarily withdraws the complaint should be with prejudice. This suggestion is the result of a decision of the U.S. Court of Appeals for the District of Columbia Circuit in a case in which the Board determined two applicants were not "prevailing parties" for purposes of the EAJA when the FAA withdrew its case against them prior to hearing. Turner and Coonan v. NTSB, 608 F.3d 12 (2010). In Turner and Coonan, the D.C. Circuit applied a three-part test from District of Columbia v. Straus, 590 F.3d 898, 901 (D.C. Cir. 2010), for the purpose of determining whether a party has, for purposes of the EAJA, prevailed in an underlying proceeding: (1) there must be a "court-ordered change in the legal relationship" of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief. In Turner and Coonan, the D.C. Circuit indicated a law judge's dismissal of a case "with prejudice" might have provided the applicants with judicial relief sufficient to fulfill the third prong of that test. As a result, some comments encourage the NTSB to implement a rule stating such dismissals will always occur "with prejudice."

MMO's second set of comments specifically suggests how the NTSB should handle cases in which the FAA withdraws a complaint just prior to the hearing. The submission states:

Once the Respondent has made a good faith, honest showing that there is no prima [facie] case, FAA should proceed at its peril if it elects to ignore the Respondent's showing. This will deter a lot of cases which are based on misinformation at the FSDO inspector level. If a Respondent shows FAA Counsel that the underlying facts and conclusions are incorrect, FAA should have a duty to require its inspector(s) to re-evaluate their information to make sure it is correct before forcing the Respondent to defend the case further.

MMO also suggests awards of attorney fees be made "based on the average fees [charged] by aviation defense counsel having experience approximately equal to those of actual defense counsel for the prevailing Respondent." The commenter further suggests that awards of legal fees be made to all certificate holders who can show the FAA proceeded when it did not have a prima facie case, "regardless of the net worth of the Respondent."

With regard to other proposed amendments to part 826, the FAA's submission suggests changing the rule that contains outdated information as to where a successful applicant should seek payment after the Board issues a decision awarding fees and expenses under the EAJA. The FAA suggests the NTSB change 49 CFR 826.40 to "specify only that the applicant shall comply with all FAA administrative requirements for payment (i.e., providing

the FAA with bank routing and account numbers, tax identification numbers, address, etc.) and that the FAA should pay promptly." Further, the FAA suggests the NTSB delete from section 826.40 the language stating "the agency will pay the amount awarded to the applicant within 60 days," and, instead, include the "pay promptly" language suggested above.

#### F. Other Matters

The FAA's submission also requests the NTSB make a "technical correction" to subpart B of 49 CFR part 821, in order to clarify the general rules of practice also apply to appeals in cases involving civil penalties. The FAA correctly notes section 821.2 ("Applicability and description of part") states, "[t]he provisions of this part also govern all proceedings on appeal from an order of the Administrator imposing a civil penalty." Subpart B, however, does not reference the statutory section under which the FAA may impose a civil penalty, and the FAA, therefore, suggests the NTSB clarify it applies to appeals of civil penalties.

### III. Proposed Changes

#### A. Electronic Filing

As the NTSB stated in the ANPRM, we are committed to implementing an electronic filing system. The NTSB carefully considered the comments received concerning electronic filing, and determined the least costly and most effective manner of



introducing the practice of electronic filing is to propose incremental changes, commencing with the acceptance of filings via electronic mail.

1. Section 821.7(a)(1) (Filing of documents with the Board.)

The NTSB proposes the addition of two new sentences at the end of section 821.7(a)(1), to provide parties the option to submit documents electronically. With this addition, section 821.7(a)(1) would read as follows: "(1) Except as provided in paragraph (2), documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, S.W., Room 4704, Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager. ***Filings may be made by paper (hard copy), including by facsimile at (202) 314-6158, or (except as otherwise provided in Subpart I) by electronic mail at alj@ntsb.gov. Filings made by facsimile or electronic mail are subject to additional requirements set forth in paragraphs (a)(3) and (4) of this section.***"

2. Section 821.7(a)(2) (Filings of documents with the Board.)

The NTSB proposes to amend section 821.7(a)(2) as follows: "(2) Subsequent to the filing of a notice of appeal with the

Office of Administrative Law Judges from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490 L'Enfant Plaza East, S.W., Room 6401, Washington, D.C. 20594. ***Filings may be made by hard copy, including by facsimile at (202) 314-6090, or by electronic mail at enforcement@ntsb.gov. Filings made by facsimile or electronic mail are subject to additional requirements set forth in paragraphs (a)(3) and (4) of this section.***

3. Section 821.7(a)(3) (Filing of documents with the Board.)

As described above, the NTSB would like to accommodate parties who prefer to submit documents to the NTSB via facsimile and electronic mail. To do so, the NTSB proposes to amend section 821.7(a)(3) as follows: "(3) ***Except as otherwise provided in Subpart I (governing emergency proceedings), documents shall be filed: by personal delivery, by U.S. Postal Service first-class mail, by overnight delivery service, by facsimile or by electronic mail. Documents filed by electronic mail must be signed and transmitted in a commonly accepted format, such as Adobe Portable Document Format (PDF).*** "

4. Section 821.7(a)(4) (Filing of documents with the Board.)

The NTSB proposes amending the language of section 821.7(a)(4) to reflect electronic service of documents, as follows: "(4) Documents shall be deemed filed: on the date of personal delivery; on the send date shown on the facsimile **or the item of electronic mail**; and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Where the document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark."

5. Section 821.8(b) (Service of documents.)

The NTSB proposes adding the option for parties to receive documents only by electronic mail to subsection (1) of § 821.8(b) with the following language: "(1) Service of documents by any party on any other party shall be accomplished by any method prescribed in § 821.7(a)(3) for the filing of documents with the Board. **A party may waive the applicability of this paragraph, and elect to be served with documents by the other parties to the proceeding solely by electronic mail, without also receiving a hard copy of the original by personal**

*delivery, first-class mail or overnight delivery service, by filing a written document with the Board (with copies to the other parties) expressly stating such a preference."*

6. Section 821.57(b) (Procedure on appeal.)

The NTSB also proposes to amend this section to provide electronic mail transmission as an option to parties submitting briefs in emergency cases. The NTSB proposes the following addition: "... Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by overnight delivery service, or by facsimile **or electronic mail**. Aside from the time limits and methods of filing and service specifically mandated by this paragraph, the provisions of § 821.48 shall apply."

B. Emergency Cases

As noted above, many comments we received in response to the ANPRM encouraged the NTSB to change the standard of review for emergency determinations (found at section 821.54(e)), and to allow certificate holders to obtain certain evidence from the FAA and submit their own evidence into the record in support of petitions for review of FAA emergency determinations. We have carefully considered these comments, and acknowledge the FAA maintains the authority to take action affecting a certificate that is immediately effective "[w]hen the Administrator is of the opinion that an emergency exists related to safety in air

commerce and requires immediate action." 49 U.S.C. 46105(c). The NTSB is also mindful of the viewpoints expressed in some comments that the standard of review is unfair and may result in irrevocable harm to certificate holders, and in other comments urging the NTSB to treat reviews of emergency determinations like requests for temporary restraining orders or preliminary injunctions. We do not believe reviews of emergency determinations made by an administrative agency such as the FAA in consideration of the public interest in aviation safety raise questions of a similar nature to civil proceedings in which injunctive relief is sought.

Although the rules provide the facts alleged in the order are assumed as true for the limited, preliminary purpose of determining whether the Administrator's emergency determination was warranted in the interest of aviation safety, the law judges have always considered evidence submissions *relevant to the propriety of the emergency determination itself*. For example, in a recent case involving revocation of a respondent's pilot and airman medical certificates based on an alleged "refusal" to submit to a random drug test by allegedly leaving the testing facility before the testing process was completed, the respondent submitted evidence showing he had passed a breath test and passed a drug test taken at his own expense and at the same facility within approximately 3 hours of furnishing the

insufficient sample. Such evidence was offered to show the respondent did not present an immediate threat to aviation safety related to alcohol or drug use. The law judge considered it favorably in granting the respondent's petition.

Nevertheless, the number of comments requesting the rules permit the submission of evidence relevant to the FAA's emergency determination suggests clarification of this point would be useful.

The NTSB therefore proposes including explicit language in the rules permitting the attachment of such evidence to petitions for review of emergency determinations. Finally, we propose adding a requirement for the FAA to provide certificate holders with certain releasable information many commenters believe necessary for a certificate holder to obtain a full understanding of the basis for a certificate action and/or an emergency determination as soon as possible. We note some commenters believe such information will significantly reduce the need for discovery, especially in the compressed time frame environment of emergency cases.

1. Section 821.54(e) (Petition for review of  
Administrator's determination of emergency.)

As explained above, the NTSB currently does not intend to remove the "assuming the truth of the allegations" language from

section 821.54(e), but proposes including explicit language permitting the respondent to present evidence challenging the emergency nature of the proceedings in the form of affidavits or other records. However, the NTSB reminds parties that a law judge's review of an emergency determination is separate and distinct from a review of the underlying certificate action on the merits. Parties should be mindful of this distinction in submitting evidence under this provision, and should only provide evidence helpful in resolving the issue of *whether the FAA's decision to take immediately effective action was appropriate*, and avoid presenting evidence that goes to the merits of the underlying certificate action.

The NTSB proposes changing section 821.54(e) as follows:

"(e) *Disposition*. Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge other than the chief law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of

the respondent's appeal. *In making this determination, however, the law judge is not so limited to the order's factual allegations themselves, but also should permit evidence, if appropriate, pertaining to the propriety of the emergency determination presented by the respondent with the petition and the Administrator with the reply to the petition. This evidence can include affidavits or other such records."*

2. Section 821.55 (Complaint, answer to complaint, motions and discovery.)

The NTSB proposes adding a new subsection, replacing current subsection (d), to section 821.55 that will make a complaint subject to dismissal if the FAA, without good cause, failed to provide a certificate holder against whom an emergency order was issued with the releasable portions of its enforcement investigation report (EIR) by the date on which the emergency order was issued. Additionally, subsection (c) will be amended to permit the filing of such a motion to dismiss, and current subsection (d) will be redesignated as subsection (e). The NTSB proposes the following language:

*"(c) Motion to dismiss and motion for more definite statement.*

*Except as provided in paragraph (d) of this section, in proceedings governed by this subpart, no motion to dismiss the complaint or for a more definite statement of the complaint's allegations shall be made, but the substance thereof may be*



stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms.

(d) Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR) with emergency or other immediately effective order. (1) *Where the Administrator has failed to include a copy of the releasable portion of the FAA's EIR with an emergency or other immediately effective order, or to provide the respondent with a copy of the releasable portion of the EIR prior to the issuance of such an order, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice.*

(2) *The releasable portion of the EIR shall include all information in the EIR, except for the following: (i) information that is privileged; (ii) information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency; (iii) information that would disclose the identity of a*

*confidential source; (iv) information of which applicable law prohibits disclosure; (v) information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or (vi) sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR § 15.5.*

*(3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR."*

### 3. Section 821.57(c) (Procedure on appeal.)

In rare cases, the Board may determine it necessary to remand an emergency case to a law judge. Therefore, the NTSB proposes changing section 821.57(c) to clarify that both subsections (a) and (b) of section 821.49 apply to emergency cases. The NTSB proposes amending subsection 821.57(c) to read: "(c) *Issues on appeal.* The provisions of § 821.49 (a) **and (b)** shall apply in proceedings governed by this subpart."

### C. Equal Access to Justice Act (EAJA)

Several commenters who responded to the ANPRM suggested the NTSB implement changes with regard to 49 CFR part 826. The NTSB has reviewed part 826 and proposes the changes discussed below, in order to ensure the rules are updated and consistent with 49 CFR part 821.

1. Section 826.1 (Purpose of these rules)

In order to make 49 CFR part 826 consistent with the terminology used in 49 CFR part 821, the NTSB proposes replacing each reference to "the Agency" with the term "the Administrator." This will necessitate a minor change to section 826.1, and the NTSB proposes that it read: "The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board. An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the FAA's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards this Board will use to make them. As used hereinafter, the term **"Administrator"** *refers to the Administrator of the FAA.*

In addition to the change to section 826.1, the NTSB proposes additional changes to sections 821 and 826 as follows.

2. Section 821.12(b) (Amendment and withdrawal of pleadings.)

As discussed above, the NTSB received several comments in response to the ANPRM concerning the EAJA, which specifically suggested the NTSB's rules should address the status of cases the FAA withdraws immediately prior to hearing. In a recent opinion involving an issue concerning whether the certificate holder was the "prevailing party" when the FAA withdrew its order just before the hearing, the Board stated it would not adopt a bright-line rule to determine when such a withdrawal should result in a dismissal *with* or *without* prejudice.

Administrator v. Koch, NTSB Order No. EA-5571 (2011) (available at: [http://www.nts.gov/legal/o\\_n\\_o/docs/Aviation/5571.pdf](http://www.nts.gov/legal/o_n_o/docs/Aviation/5571.pdf)).

The NTSB believes it best to allow its law judges to assess the facts of each case and determine whether the withdrawal was with or without prejudice. The Board will review such a determination de novo, as it does with most other issues parties present on appeal. Based on this reasoning, the NTSB proposes changing section 821.12(b) as follows: "(b) *Withdrawal*. Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board. ***The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice.***"

3. Section 826.40 (Payment of award.)

As was stated in the ANPRM, the address listed for sending applications for EAJA award grants in section 826.40 is outdated. The FAA's comment in response to the ANPRM recommends section 826.40 simply state the FAA will pay funds via electronic fund transfer, because this is the only manner in which the FAA now provides funds. The NTSB believes this change will provide sufficient flexibility to allow for the FAA to change its payment process in the future. In each case, the FAA's provision of detailed instructions to each applicant will ensure the applicant has the updated, relevant information needed to obtain payment.

Therefore, the NTSB proposes the following change to section 826.40: *"Within 5 days of the Board's service of a final decision granting an award of fees and expenses to an applicant, the Administrator shall transmit to the applicant instructions explaining how the applicant may obtain the award. These instructions may require, but are not limited to, the submission of the following information to the Administrator: a statement that the applicant will not seek review of the decision in the United States courts, bank routing numbers to which the Administrator may transmit payment, and the applicant's tax identification or Social Security number. The Administrator will pay the applicant the amount awarded within 60 days of*

***receiving the necessary information from the applicant***, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding."

#### D. Miscellaneous Technical Changes

In undertaking a detailed review of both parts 821 and 826, the NTSB has identified several sections of the rules we believe should be updated. Many of the provisions in question are either no longer practical or simply out-of-date. Some contain ambiguities the NTSB has recently identified in encountering unique situations. Therefore, this NPRM proposes to amend those sections of the rules to resolve the identified issues. Below are summaries of the proposed changes.

##### 1. Section 821.6(b) (Appearances and rights of witnesses.)

The NTSB proposes to delete the phrase, "in person," because some matters, including rulings on motions and, where the parties consent, hearings (or sessions thereof), are conducted telephonically. The NTSB proposes deleting the phrase, "in person," to clarify the rule and make it consistent with such case practice. With this change, section 821.6(b) would read, "(b) Any person appearing in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative."

2. Section 821.6(d) (Appearances and rights of witnesses.)

In a recent case, the NTSB granted reconsideration of a previous order due to a misunderstanding regarding which attorney was representing the respondent. Administrator v. Ricotta, NTSB Order No. EA-5569 (2011) (available at: [http://www.nts.gov/legal/o\\_n\\_o/docs/Aviation/5569.pdf](http://www.nts.gov/legal/o_n_o/docs/Aviation/5569.pdf)). Therefore, to make entrances of appearance clear and assure the attorney's or representative's contact information is current and more easily located within the record, the NTSB proposes adding the phrase, "in a separate written document" to the first sentence of section 821.6(d). The FAA already regularly submits separate filings with the relevant information, and many respondents' attorneys do so, as well. However, the NTSB believes it best to require such a filing in section 821.6, and to keep the attorney's or representative's contact information current. A provision has also been added to require immediate written notification when any attorney or representative withdraws from representation in a case. With these changes, section 821.6(d) would read, "(d) Any party to a proceeding who is represented by an attorney or representative shall, **in a separate written document**, notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation **or a withdrawal of**

***representation***, the party shall ***immediately, in a separate written document***, notify the Board (in the manner provided in § 821.7) and the other parties to the proceeding (pursuant to § 821.8), before the new attorney or representative may participate in the proceeding in any way. ***Parties, and their attorneys and representatives, must notify the Board immediately of any changes in their contact information.***"

3. Section 821.7(e) (Filing of documents with the Board.)

The NTSB proposes deleting the word "other" immediately preceding the word "representative" in current § 821.7(e). This word is unnecessary. With this change, § 821.7(e) will read as follows: "(e) *Subscription*. The original of every document filed shall be signed by the filing party, or by that party's attorney or representative."

4. Section 821.7(f) (Filing of documents with the Board.)

Consistent with the change to section 821.6(d) suggested above, the NTSB proposes adding the phrase "and any subsequent document advising the Board of any representation or change in representation of a party pursuant to § 821.6(d)" to section 821.7(f). With this change, section 821.7(f) would read, "(f) *Designation of person to receive service*. The initial document filed by a party in a proceeding governed by this part, ***and any***



*subsequent document advising the Board of any representation or change in representation of a party that is filed pursuant to § 821.6(d), shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf."*

5. Section 821.8(a) (Service of documents.)

The NTSB proposes adding the word "simultaneously" to subsection (a) of § 821.8, to state as follows: "(a) *Who must be served.* (1) Copies of all documents filed with the Board must be ***simultaneously*** served on (i.e., sent to) all other parties to the proceeding, on the date of filing, by the person filing them." The remainder of § 821.8(a) shall remain unchanged.

6. Section 821.8(c) (Service of documents.)

The NTSB proposes deleting parts of this section to ensure consistency with the changes proposed to § 821.7(f). We propose § 821.8(c) should include only the following language: "(c) *Where service shall be made.* Except for personal service, parties shall be served at the address appearing in the official record, ***which the Board must receive under §§ 821.6(d) and 821.7(f).*** In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence."

7. Section 821.8(d) (Service of documents.)

The NTSB proposes adding a subsection (3) to § 821.8(d), to ensure consistency with other sections in part 821 that will provide for transmission of documents via electronic mail. With the new subsection (3), § 821.8(d) will read as follows:

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under §821.7(f);

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused; **or**

**(3) When a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.**

9. Section 821.35(b)(10) (Assignment, duties and powers.)

In addition to initial decisions, law judges may dispose of cases by dispositional order, where appropriate. Therefore, the NTSB proposes adding the phrase "and dispositional orders" to this subsection, to state as follows: "(b) *Powers of law judge.*

Law judges shall have the following powers: ... (10) To issue initial decisions ***and dispositional orders.***"

10. Section 821.50(c) (Petition for rehearing, reargument, reconsideration or modification of an order of the Board.)

Recently, the NTSB has received an increased number of petitions for reconsideration. Most of these petitions do not contain "new matter" under the rule, but instead challenge the Board's legal reasoning and may contain legal arguments the parties could have made in their appeal briefs. The NTSB proposes clearly addressing this issue by adding the following to the end of Section 821.50(c): ***"To the extent the petition is not based upon new matter, the Board will not consider arguments that could have been made in the appeal or reply briefs received prior to the Board's decision."***

11. Section 821.64(b) (Judicial review.)

The NTSB recently encountered a situation in which the respondent filed a motion for a stay pending judicial review on the 29th day following the date of service of the Board's decision, and this circumstance highlighted the ambiguity of the current language in this subsection. To ensure the deadline is clear, the NTSB proposes amending this subsection to give the respondent 20 days to file a motion for a stay, and the FAA 2 days to reply to the motion, as follows: ***"(b) Stay pending***

*judicial review. No request for a stay pending judicial review will be entertained **unless it is served on the Board within 20 days after the date of service of the Board's order. The Administrator may, within 2 days after the date of service of such a motion, file a reply thereto.***

## 12. Other matters

The changes proposed below do not include any changes indicating the rules of subpart B apply to civil penalty actions. The NTSB declines to propose any such change because it believes that the language of section 821.2 sufficiently indicates that 49 CFR part 821 applies to civil penalty cases. In addition, we note that, in the definitions section of subpart A (section 821.1), the term "complaint" is defined as "an order of the Administrator ... from which an appeal to the Board has been taken pursuant to sections 49 U.S.C. 44106, 44709, 46301." This last cited provision, section 46301 of title 49, United States Code, concerns civil penalties for violations of various provisions in subtitle VII (Aviation Programs) of that title.

### E. Regulatory Analyses

1. Executive Order 12866 (Regulatory Planning and Review); Executive Order 13579 (Regulation and Independent Regulatory Agencies); Unfunded Mandates Reform Act; and the Environmental Policy Act

This notice of proposed rulemaking is not a significant regulatory action under Executive Order 12866. Therefore, Executive Order 12866 does not require a Regulatory Assessment. As such, the Office of Management and Budget (OMB) has not reviewed this proposed rule under Executive Order 12866. In addition, on July 11, 2011, the President issued Executive Order 13579, "Regulation and Independent Regulatory Agencies," 76 FR 41587, July 14, 2011. Section 2(a) of the Executive Order states:

Independent regulatory agencies "should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned."

76 FR at 41587.

Consistent with Executive Order 13579, the NTSB's proposed amendments to 49 CFR parts 821 and 826 reflect its judgment that these rules should be updated and streamlined.

This rule does not require an analysis under the Unfunded Mandates Reform Act, 2 United States Code (U.S.C.) 1501-1571, or the National Environmental Policy Act, 42 U.S.C. 4321-4347.

## 2. Executive Order 13132 (Federalism)

The NTSB has analyzed this NPRM in accordance with the principles and criteria contained in Executive Order 13132. Any rulemaking proposal resulting from this notice would not propose

any regulations that would: (1) have a substantial direct effect on the states, the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government; (2) impose substantial direct compliance costs on state and local governments; or (3) preempt state law. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

### 3. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires each agency to review its rulemaking to assess the potential impact on small entities, unless the agency determines that a rule is not expected to have a significant economic impact on a substantial number of small entities. The NTSB certifies this NPRM will not have a significant economic impact on a substantial number of small entities. However, the NTSB will consider comments to facilitate any further analysis on this issue, should commenters believe otherwise.

### 4. Other Executive Orders and Statutory Provisions

This NPRM also complies with all applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. In addition, the NTSB has evaluated this rule under: Executive Order 12630, Governmental Actions and

Interference with Constitutionally Protected Property Rights; Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks; Executive Order 13175, Consultation and Coordination with Indian Tribal Governments; Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use; and the National Technology Transfer and Advancement Act, 15 U.S.C. 272 note. The NTSB has concluded that this rule does not contravene any of the requirements set forth in these Executive Orders or statutes, nor does this rule prompt further consideration with regard to such requirements.

**List of Subjects for 49 CFR part 821:**

Administrative practice and procedure, Airmen, Aviation safety.

**List of Subjects for 49 CFR part 826:**

Claims, Equal access to justice, Lawyers.

For the reasons discussed in the preamble, the NTSB proposes to amend 49 CFR parts 821 and 826 as follows:

**PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS**

1. The authority citation for 49 CFR part 821 continues read as follows:

Authority: 49 U.S.C. 1101-1155, 44701-44723, 46301, unless otherwise noted.

2. In § 821.6, revise paragraphs (b) and (d) to read as follows:

**§ 821.6 Appearances and rights of witnesses.**

\* \* \* \* \*

(b) Any person appearing in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative.

\* \* \* \* \*

(d) Any party to a proceeding who is represented by an attorney or representative shall, in a separate written document, notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation or a withdrawal of representation, the party shall immediately, in a separate written document, notify the Board (in the manner provided in § 821.7) and the other parties to the proceeding (pursuant to § 821.8), before the new attorney or representative may participate in the proceeding in any way. Parties, and their attorneys and representatives, must notify the Board immediately of any changes in their contact information.

3. In § 821.7, revise paragraphs (a), (e) and (f) to read as follows:



**§ 821.7 Filing of documents with the Board.**

*(a) Filing address, method and date of filing.*

(1) Except as provided in paragraph (a)(2) of this section, documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, S.W., Room 4704, Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager. Filings may be made by paper (hard copy), including by facsimile at (202) 314-6158, or (except as otherwise provided in Subpart I) by electronic mail at [alj@ntsb.gov](mailto:alj@ntsb.gov). Filings made by facsimile or electronic mail are subject to additional requirements set forth in paragraphs (a)(3) and (4) of this section.

(2) Subsequent to the filing of a notice of appeal with the Office of Administrative Law Judges from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490

L'Enfant Plaza East, SW., Room 6401, Washington, DC 20594  
Filings may be made by hard copy, including by facsimile at  
(202) 314-6090, or by electronic mail at  
[enforcement@ntsb.gov](mailto:enforcement@ntsb.gov). Filings made by facsimile or  
electronic mail are subject to additional requirements set  
forth in paragraphs (a)(3) and (4) of this section.

(3) Except as otherwise provided in Subpart I (governing  
emergency proceedings), documents shall be filed: by  
personal delivery, by U.S. Postal Service first-class mail,  
by overnight delivery service, by facsimile or by  
electronic mail. Documents filed by electronic mail must  
be signed and transmitted in a commonly accepted format,  
such as Adobe Portable Document Format (PDF).

(4) Documents shall be deemed filed on the date of personal  
delivery; on the send date shown on the facsimile or the  
item of electronic mail; and, for mail delivery service, on  
the mailing date shown on the certificate of service, on  
the date shown on the postmark if there is no certificate  
of service, or on the mailing date shown by other evidence  
if there is no certificate of service and no postmark.

Where the document bears a postmark that cannot reasonably  
be reconciled with the mailing date shown on the  
certificate of service, the document will be deemed filed  
on the date of the postmark.

\*\*\*\*\*

(e) *Subscription.* The original of every document filed shall be signed by the filing party, or by that party's attorney or representative.

(f) *Designation of person to receive service.* The initial document filed by a party in a proceeding governed by this part, and any subsequent document advising the Board of any representation or change in representation of a party that is filed pursuant to § 821.6(d), shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf.

\*\*\*\*\*

4. In § 821.8, revise paragraphs (a), (b) (1), (c), (d) and (e) to read as follows:

**§ 821.8 Service of documents.**

(a) *Who must be served.*

(1) Copies of all documents filed with the Board must be simultaneously served on (i.e., sent to) all other parties to the proceeding, on the date of filing, by the person filing them. A certificate of service shall be a part of each document and any copy or copies thereof tendered for filing, and shall certify concurrent service on the Board and the parties. A certificate of service shall be in substantially the following form:

"I hereby certify that I have this day served the foregoing [specify document] on the following party's counsel or designated representatives [or party, if without counsel or representative], at the address indicated, by [specify the method of service (e.g., first-class mail, personal service, etc.)]

[List names and addresses of all persons served]

Dated at \_\_\_\_\_, this \_\_\_\_ day of \_\_\_\_\_, 20\_\_

(Signature) \_\_\_\_\_

For (on behalf of) \_\_\_\_\_"

(2) Service shall be made on the person designated in accordance with § 821.7(f) to receive service. If no such person has been designated, service shall be made directly on the party.

(b) *Method of Service.*

(1) Service of documents by any party on any other party shall be accomplished by any method prescribed in § 821.7(a)(3) for the filing of documents with the Board. A party may waive the applicability of this paragraph, and elect to be served with documents by the other parties to the proceeding solely by electronic mail, without also receiving a hard copy of the original by personal delivery, first-class mail or overnight delivery service, by filing a written document with the Board (with copies to the other parties) expressly stating such a preference.

\* \* \* \* \*

(c) *Where service shall be made.* Except for personal service, parties shall be served at the address appearing in the official

record, which the Board must receive under §§ 821.6(d) and 821.7(f). In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence.

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under §821.7(f);

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused; or

(3) When a document is transmitted by facsimile or electronic mail and there is evidence to confirm its successful transmission to the intended recipient.

(e) *Date of service.* The date of service shall be determined in the same manner as the filing date is determined under § 821.7(a)(4).

5. In § 821.12, revise paragraph (b) to read as follows:

**§ 821.12 Amendment and withdrawal of pleadings.**

\* \* \* \* \*

(b) *Withdrawal*. Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from the withdrawal of a complaint should be deemed to occur with or without prejudice.

6. In § 821.35, revise paragraph (b)(10) to read as follows:

**§ 821.35 Assignment, duties and powers.**

\* \* \* \* \*

(b) \*\*\*

(10) To issue initial decisions and dispositional orders.

\*\*\*\*\*

7. In § 821.50, revise paragraph (c) to read as follows:

**§ 821.50 Petition for rehearing, reargument, reconsideration or modification of an order of the Board.**

\* \* \* \* \*

(c) *Content*. The petition shall state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon. If the petition is based, in whole or in part, upon new matter, it shall set forth such new matter and shall contain affidavits of prospective

witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable, and shall explain why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed. To the extent the petition is not based upon new matter, the Board will not consider arguments that could have been made in the appeal or reply briefs received prior to the Board's decision.

\*\*\*\*\*

8. In § 821.54, revise paragraph (e) to read as follows:

**§ 821.54 Petition for review of Administrator's determination of emergency.**

\* \* \* \* \*

(e) *Disposition.* Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge other than the chief law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the

respondent's appeal. In making this determination, however, the law judge is not so limited to the order's factual allegations themselves, but also should permit evidence, if appropriate, pertaining to the propriety of the emergency determination presented by the respondent with the petition and the Administrator with the reply to the petition. This evidence can include affidavits or other such records.

\*\*\*\*\*

9. In § 821.55, revise paragraphs (c) and (d) to read as follows:

**§ 821.55 Complaint, answer to complaint, motions and discovery.**

\* \* \* \* \*

*(c) Motion to dismiss and motion for more definite statement.*

Except as provided in paragraph (d) of this section, in proceedings governed by this subpart, no motion to dismiss the complaint or for a more definite statement of the complaint's allegations shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms.

*(d) Motion to dismiss for failure to include copy of releasable portion of Enforcement Investigative Report (EIR) with emergency or other immediately effective order.*



(1) Where the Administrator has failed to include a copy of the releasable portion of the FAA's EIR with an emergency or other immediately effective order, or to provide the respondent with a copy of the releasable portion of the EIR prior to the issuance of such an order, the respondent may move to dismiss the complaint and, unless the Administrator establishes good cause for that failure, the law judge shall dismiss the complaint. The law judge may accept arguments from the parties on the issue of whether a dismissal resulting from failure to provide the releasable portions of the EIR should be deemed to occur with or without prejudice.

(2) The releasable portion of the EIR shall include all information in the EIR, except for the following:

- (i) Information that is privileged;
- (ii) Information that is an internal memorandum, note or writing prepared by a person employed by the FAA or another government agency;
- (iii) Information that would disclose the identity of a confidential source;
- (iv) Information of which applicable law prohibits disclosure;

(v) Information about which the law judge grants leave to withhold as not relevant to the subject matter of the proceeding or otherwise, for good cause shown; or

(vi) Sensitive security information, as defined at 49 U.S.C. 40119 and 49 CFR § 15.5.

(3) Nothing in this section shall be interpreted as preventing the Administrator from releasing to the respondent information in addition to that which is contained in the releasable portion of the EIR.

10. In § 821.57, revise paragraphs (b) and (c) to read as follows:

**§ 821.57 Procedure on appeal.**

\* \* \* \* \*

(b) *Briefs and oral argument.* Each appeal in proceedings governed by this subpart must be perfected, within 5 days after the date on which the notice of appeal was filed, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. Any other party to the proceeding may file a brief in reply to the appeal brief within 7 days after the date on which the appeal brief was served on that party. A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by

overnight delivery service, or by facsimile or electronic mail. Aside from the time limits and methods of filing and service specifically mandated by this paragraph, the provisions of § 821.48 shall apply.

(c) *Issues on appeal*. The provisions of § 821.49(a) and (b) shall apply in proceedings governed by this subpart.

\*\*\*\*\*

11. In § 821.64, revise paragraph (b) to read as follows:

**§ 821.64 Judicial Review.**

\* \* \* \* \*

(b) *Stay pending judicial review*. No request for a stay pending judicial review will be entertained unless it is served on the Board within 20 days after the date of service of the Board's order. The Administrator may, within 2 days after the date of service of such a motion, file a reply thereto.

**PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980**

12. The authority citation for 49 CFR part 826 continues read as follows:

Authority: Section 203(a)(1) Pub. L. 99-80, 99 Stat. 186 (5 U.S.C. 504).

13. Section 826.1 is revised to read as follows:

**§ 826.1 Purpose of these rules.**

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board. An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the FAA's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards this Board will use to make them. As used hereinafter, the term "Administrator" refers to the Administrator of the FAA.

14. Section 826.40 is revised to read as follows:

**§ 826.40 Payment of award.**

Within 5 days of the Board's service of a final decision granting an award of fees and expenses to an applicant, the Administrator shall transmit to the applicant instructions explaining how the applicant may obtain the award. These instructions may require, but are not limited to, the submission of the following information to the Administrator: a statement that the applicant will not seek review of the decision in the United States courts, bank routing numbers to which the

Administrator may transmit payment, and the applicant's tax identification or Social Security number. The Administrator will pay the applicant the amount awarded within 60 days of receiving the necessary information from the applicant, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

Deborah A.P. Hersman,

Chairman

Dated: January 27, 2012

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